

1 (The jury is present.)

2 THE COURT: Now we're going to turn to the
3 questions of invalidity. And claims of a patent, as
4 you know, can be found to be invalid, and Lawson
5 contends that the claims here, all of them, are
6 invalid.

7 Remember that a patent is presumed to be
8 valid and, therefore, Lawson has to prove by clear
9 and convincing evidence that a claim is invalid.

10 Clear and convincing evidence is evidence
11 which produces in your minds an abiding conviction
12 that the truth of the factual contentions are highly
13 probable. In other words, it's different from a
14 preponderance of the evidence standard.

15 For those of you who have been in criminal
16 cases, it's not as high as beyond a reasonable doubt,
17 but it's higher than preponderance and less than a
18 reasonable doubt. And that instruction is No. 29 if
19 you need to refresh your memory on it.

20 Lawson contends that all the claims are
21 invalid for anticipation and are obvious. Those are
22 the two grounds. And they are obvious in view or
23 anticipated in view of prior art references. In
24 particular, Lawson says that all of ePlus' claims are
25 anticipated by certain prior art references and

1 contends they are obvious by prior art references.

2 The following things can be prior art:

3 (1) Any product or method that was publicly
4 known or used by others in the United States before
5 the patented invention was made;

6 (2) publications having a date more than one
7 year before the filing date of the patent;

8 (3) any product or method that was in public
9 use or on sale in the United States more than one year
10 before the patent was filed;

11 (4) any patent granted on an application for
12 patent by another person filed in the United States
13 before the invention by the applicant for the patent.

14 Lawson contends that the following, each one
15 of them, are prior art that anticipates. Now, there's
16 a difference between their contention of what is prior
17 art that anticipates the patent and what is prior art
18 that makes the patent obvious. And this is the prior
19 art for purposes of anticipation. And that is what
20 they call the Fisher RIMS system and also U.S. Patent
21 number, what's been called the '989 patent.

22 EPlus disputes that any of those are prior
23 art or that any of these anticipate the asserted
24 claims. It is up to you to decide what is or isn't
25 prior art in accord with instructions that I give you.

1 Both the parties have reviewed parts of the
2 '683 patent that use the term "incorporation by
3 reference." I think it's early in the specification.
4 Incorporation by reference is a legal phrase that
5 allows a patent applicant to make any other document
6 become part of the patent application in such a manner
7 that the incorporated document can be considered to be
8 part of the patent application just as if incorporated
9 documents have been fully set out in the application.

10 So if I incorporated something by reference,
11 I say, "I incorporate this by reference with this."
12 And I have that written in here. Everything that is
13 on this piece of paper now becomes part of that piece
14 of paper without having to retype it and put it all in
15 there. That is simply what incorporation by reference
16 means.

17 Now, on the topic of anticipation, we begin
18 with the premise that a person cannot obtain a patent
19 if someone else already has made an identical
20 invention. So, simply put, the invention has to be
21 new. An invention that is not new or novel is said to
22 be anticipated by prior art.

23 Under the patent laws, an invention that is
24 anticipated is not entitled to be patented at all. To
25 prove anticipation, Lawson must prove by clear and

1 convincing evidence that the claimed invention is not
2 new. In this case, Lawson contends that each of the
3 claims of the ePlus patents are anticipated. To
4 anticipate, each and every element in the claim must
5 be present in the single item of prior art.

6 So looking at what Lawson has said is the
7 prior art, all right, you've got the Fisher RIMS
8 system. First, you have to find what the Fisher RIMS
9 system is. Go look at it. And then you have to
10 decide is each and every element in a claim present in
11 a single item of that prior art.

12 Same thing with the '989 patent. Get the
13 '989 patent. You've heard what they say about it all.
14 You know what their arguments are. The issue is, is
15 each and every element in a claim present in the '989
16 patent? And you just do that claim by claim.

17 Anticipation, therefore, cannot be
18 established by combining two or more items of prior
19 art. You can't do that. Now, that's different than
20 in obviousness. In obviousness, there is an argument
21 for combination, but in anticipation, it all has to be
22 in one document or it doesn't anticipate or in one of
23 the things that I have told you is prior art.

24 In determining whether every one of the
25 elements of the claimed invention is found in the

1 alleged prior art, you should take into account what a
2 person of ordinary skill in the art would have
3 understood from his or her examination of the prior
4 art reference.

5 In other words, what would a person of
6 ordinary skill in the art have concluded from viewing
7 the '789 patent, once you find it, and the Fisher RIMS
8 system, once you determine what you're going to do
9 with that.

10 In determining whether a single item of prior
11 art anticipates a patent claim, you should take into
12 consideration not only what is expressly disclosed in
13 the particular item of the alleged prior art, but also
14 what inherently resulted from its practice. This is
15 called inherency, and a party claiming inherency must
16 prove it by clear and convincing evidence. To
17 establish inherency, the evidence must make clear that
18 the prior art either necessarily resulted in the
19 missing descriptive matter and that it would be so
20 recognized by a person of ordinary skill in the art at
21 the time that patent application was filed. And you
22 just keep those instructions in mind and apply them to
23 each anticipation that you have before you.

24 Now, Lawson contends that all of the claims
25 of the ePlus patents were anticipated because the

1 invention defined in those claims were publicly known
2 by others in the United States before they were
3 invented by the inventors. The inventions defined by
4 the ePlus patent claims were invented on August 10,
5 1994.

6 A patent claim is invalid if the invention
7 defined in that claim was publicly known by others in
8 the United States before it was invented by the
9 inventors.

10 Lawson also contends that all of the claims
11 of the ePlus patents were anticipated because the
12 inventions defined in those claims were publicly used
13 by others in the United States before they were
14 invented by the inventors or they were publicly used
15 in the United States more than one year before the
16 ePlus inventors filed their application on August 10,
17 1994.

18 A patent claim is invalid if the invention
19 defined in that claim was publicly used by a person
20 other than the patentee in the United States before it
21 was invented by the patentee or was publicly used by
22 anyone in the United States more than a year before
23 the effective filing date of the patentee's patent
24 application.

25 An invention is publicly used if it is used

1 by the inventor by a person who is not under any
2 limitation, restriction or obligation of secrecy to
3 the inventor. The absence of affirmative steps to
4 conceal is evidence of a prior use; however, secret
5 use by a third part is not public use. If the public
6 use was an experimental use performed in order to
7 bring the invention to perfection or to determine if
8 the invention is capable of performing its intended
9 purpose, then such a use does not invalidate the
10 claim.

11 Now, oral testimony alone, the lawyers
12 referred to this, is just not enough to establish the
13 existence of a prior public use or knowledge by clear
14 and convincing evidence.

15 Generally, oral testimony of prior public use
16 or knowledge must be corroborated in order to
17 invalidate a patent. Corroboration simply means
18 supported.

19 Documentary or physical evidence that is made
20 contemporaneously with the inventive process provides
21 the most reliable proof that the alleged prior art
22 inventor's testimony has been corroborated.

23 If you find that Lawson has not corroborated
24 the oral testimony that they rely on to show prior
25 public use or knowledge with other evidence, then you

1 are not permitted to find that the subject of that
2 oral testimony qualifies as prior public use or
3 knowledge for purposes of invalidating one or more
4 claims of the patents-in-suit.

5 If evidence is presented for purposes of
6 attempting to corroborate oral testimony that alleges
7 invalidity, then you have to determine whether this
8 evidence, in fact, properly corroborates the oral
9 testimony. So in other words, if somebody said, well,
10 it was publicly known or publicly used or it or there
11 was knowledge of it, and that's the oral testimony,
12 then you have to look is there any other evidence that
13 backs that up. If there isn't any other evidence that
14 backs it up, that's all there is, then you can't
15 consider that as proven by clear and convincing
16 evidence.

17 So you look and see what else is the other
18 evidence to corroborate it. And in looking at that
19 other evidence and whether you should consider it, you
20 decide what's the relationship between the
21 corroborating witness and the alleged prior user;
22 what's the time period between the event that's being
23 used to corroborate and the trial; what's the interest
24 of the corroborating witness in the subject matter of
25 this suit; any contradiction or impeachment of the

1 witness's testimony; the extent and detail of
2 corroborating witness's testimony; the witness's
3 familiarity with the subject matter of the patented
4 invention and the alleged prior use; probability that
5 a prior use could occur considering the state of the
6 art at the time; and the impact of the invention on
7 the industry, and the commercial value of its
8 practice.

9 Lawson also contends that all of the claims
10 of the ePlus patents were anticipated because the
11 inventions defined in those claims were publicly sold
12 or offered for sale more than one year before the
13 ePlus inventors filed their application on August 10,
14 1994.

15 A patent claim is invalid if, more than a
16 year before the patent application date, an embodiment
17 of the claimed invention was both (1) subject to
18 commercial offering for sale in the United States and
19 (2) ready for patenting. They have to prove that by
20 clear and convincing evidence. That is, Lawson does.

21 An invention was "on sale" if the claimed
22 invention was embodied in the thing sold or
23 commercially offered for sale. It is not required
24 that a sale is actually made. The essential question
25 is whether or not there was an attempt to obtain

1 commercial benefit with the invention.

2 In order to be on sale, the invention claimed
3 in the patent must have been ready for patenting at
4 the time of the alleged offer for sale is made. An
5 invention is ready for patenting either when it is
6 reduced to practice or when the inventor has prepared
7 drawings or other descriptions of the invention
8 sufficient to allow a person of ordinary skill in the
9 art to make use of the invention. The claimed
10 invention is ready for patenting when there is reason
11 to believe it would work for its intended purpose.

12 Lawson also contends that all of the claims
13 of the ePlus patents were anticipated because the
14 inventions defined in those claims were described in a
15 printed publication that was published either before
16 the inventors made the claimed inventions, that is on
17 August 10, 1994, or more than one year before they
18 filed those claims. That would be before August 10,
19 1993.

20 MR. ROBERTSON: Your Honor, may we approach,
21 sir?

22 THE COURT: What?

23 MR. ROBERTSON: May we approach?

24 THE COURT: Yes.

25 (The following sidebar conference is begun:)

1 MR. ROBERTSON: Correct me if I'm wrong, but
2 this should be out now since the RIMS brochure is no
3 longer anticipatory.

4 THE COURT: Would you speak into the
5 microphone. What should be out?

6 MR. ROBERTSON: This instruction because the
7 only printed publication I thought that was being
8 alleged was the RIMS brochure.

9 MS. STOLL-DeBELL: This is what I was trying
10 to say yesterday. This needs to go in because TV/2
11 general information manual and the TV/2 brochure
12 qualifies as prior art under this section. So I had
13 talked about putting anticipation.

14 MR. McDONALD: Just to be clear, they are not
15 only anticipatory references, but they are prior art
16 references because they are printed publications.

17 THE COURT: No, they don't go in here. This
18 is anticipation.

19 MR. McDONALD: They have to be explained
20 somewhere.

21 THE COURT: That doesn't count. You don't
22 just do somewhere. You have to do it for a particular
23 purpose. What do you all think? Most people don't
24 deal with these things the way you-all did. You left
25 an awful lot, both of you did, of instruction in here

1 that doesn't need to be here. You don't have any
2 evidence on half of it. It's just ridiculous.

3 If this has any applicability, it goes in
4 obviousness; is that right?

5 MR. McDONALD: That would be right.

6 THE COURT: Do you agree with that?

7 MR. ROBERTSON: Yes.

8 THE COURT: I'll change it and put it there.
9 All right.

10 (The sidebar conference is concluded.)

11 THE COURT: Now, I think at one time you-all
12 heard in the opening argument that Lawson also relied
13 on the printed publication rule as respecting
14 anticipation. They don't do that anymore. And so
15 what I just said about claims of the ePlus patent were
16 anticipated because they were described in a printed
17 publication before the invention or a year before,
18 that doesn't apply because that's not part of the case
19 anymore. I will deal with that topic in obviousness.

20 Lawson also does contend, though, that all of
21 the claims of ePlus' patents were anticipated by a
22 patent that issued from a prior patent application. A
23 patent may be prior art to a patent claim even if the
24 patent issued after the filing date of the
25 patents-in-suit. This occurs when the patent

1 application for the earlier patent was filed by
2 another person before the subject matter of the
3 patents-in-suit that was invented. In this case, the
4 prior art patent is the '989 patent. And ePlus, of
5 course, does not admit that the patent anticipates the
6 ePlus patents-in-suit and disputes that the '989
7 patent is prior art.

8 Now, we're going to turn to obviousness.
9 Another theory of obviousness or invalidity, excuse
10 me, is obviousness. And a claimed invention is
11 invalid as obvious if it would have been obvious to a
12 person of ordinary skill in the art of the claimed
13 invention at the time the invention was made.

14 Unlike anticipation, which allows
15 consideration of only one item of prior art,
16 obviousness may be shown by considering more than one
17 item. So in anticipation, there's no combination
18 issue. It all has to appear in a single item of prior
19 art or it's not proved by clear and convincing
20 evidence.

21 And obviousness can be found by clear and
22 convincing evidence, as I'll tell you later, that the
23 combination renders it obvious.

24 The following factors have to be evaluated to
25 determine whether Lawson has established by clear and

1 convincing evidence that the claimed inventions are
2 obvious.

3 Now, before we go into that, let me tell you
4 that Lawson contends that a combination of two or more
5 of the following is prior art that renders obvious the
6 asserted claims here, and they consider all of the
7 claims are obvious.

8 One is the Fisher RIMS system. One is the
9 '989 patent. Another one is the so-called RIMS
10 brochure, the kind of purple thing that was attached
11 to the trademark application, the TV/2 general
12 information brochure, the TV/2 brochure, and the TV/2
13 system.

14 EPlus disputes that any of those are prior
15 art or that any of them, if prior art, even render
16 obvious the claims. And you have to decide what is
17 the prior art.

18 So what are you going to take into account in
19 establishing and deciding whether Lawson has
20 established by clear and convincing evidence that the
21 claimed inventions are obvious?

22 (1) The scope and content of the prior art
23 relied upon by Lawson;

24 (2) the difference or differences, if any,
25 between each claim of the ePlus patents that Lawson

1 contends is obvious and the prior art on which Lawson
2 bases its assertion of obviousness;

3 (3) the level of ordinary skill in the art
4 at the time the invention of the ePlus patents were
5 made. That's August of 1994.

6 Additional considerations, if any, that
7 indicate that the invention was obvious or not
8 obvious. Each of those factors have to be evaluated,
9 although they may be analyzed in any order, but you
10 must perform a separate analysis for each of the
11 claim. And obviousness, as I said must, be proved by
12 clear and convincing evidence, obviousness.

13 You should analyze whether there are any
14 relevant differences between the prior art and the
15 claimed invention from the viewpoint of a person of
16 ordinary skill in the art at the time of the
17 invention. So your analysis has to determine the
18 impact, if any, of such differences on the obviousness
19 or non-obviousness of the invention as a whole and not
20 on merely some portion of it.

21 In analyzing the relevance of the differences
22 between the claimed invention and the prior art, you
23 do not need to look for precise teaching in the prior
24 art directed to the subject matter of the claim. In
25 other words, it doesn't have to say, Do this, do this,

1 and do that.

2 You may take into account the inferences and
3 creative steps that a person of ordinary skill in the
4 art would have employed in reviewing the prior art at
5 the time of the invention.

6 Importantly, a claim is not proved obvious
7 merely by of demonstrating that each of the elements
8 was independently known in the prior art.

9 Most, if not all, inventions rely on building
10 blocks long since uncovered, and claimed discoveries
11 almost of necessity will likely be combinations of
12 what is already know.

13 Therefore, you should consider whether a
14 reason existed at the time of the invention at issue
15 here that would have prompted a person of ordinary
16 skill in the art in the relevant field to combine the
17 known elements in the way the claimed invention does.
18 The reason could come from the prior art, from the
19 background knowledge of one of ordinary skill in the
20 art, from the nature of the problem, the market
21 demand, or common sense.

22 Again, you must do it on a claim by claim
23 basis.

24 The determination of whether a claimed
25 invention is obvious is based on the perspective of a

1 person of ordinary skill in the art. That person is
2 presumed to know all the art that you have determined
3 to be reasonably relevant. That is, that you find is
4 prior art. And that person can use common sense to
5 solve the problems.

6 Now, there are factors indicating obviousness
7 that you should take into account. You must also
8 consider certain factors which, if established, may
9 indicate that the invention would not have been
10 obvious, as well.

11 MR. ROBERTSON: Your Honor, I think you
12 misspoke. You said there are factors that are
13 indicating obviousness. I think it's factors
14 indicating non-obviousness. I just wanted to make
15 sure of the title there.

16 THE COURT: I didn't read the title. They
17 don't read the titles into this.

18 MR. ROBERTSON: I'm sorry, sir.

19 THE COURT: I didn't read the title. I never
20 do. But I'll be clear. Let's start again.

21 You have to also consider certain factors,
22 which, if they are proved or if they are established,
23 may indicate that the invention would not have been
24 obvious. And no factor alone is dispositive, and you
25 must consider the obviousness or non-obviousness of

1 the invention as a whole.

2 So what do you consider there?

3 (1) Were products covered by a claim
4 commercially successful? That is, were products that
5 were covered by the claim in the patent commercially
6 successful due to the merits of the claim invention
7 rather than due to advertising, promotion,
8 salesmanship, or features of the product other than
9 those found in the claim?

10 (2) Was there a long felt, but unresolved,
11 need for a solution to the problem facing the
12 inventors, which was satisfied by the claimed
13 invention?

14 (3) Did others try, but fail, to solve the
15 problem solved by the claimed invention?

16 (4) Did others copy the claimed invention?

17 (5) Did the claimed invention achieve
18 unexpectedly superior results over the closest prior
19 art?

20 (6) Did others in the field praise the
21 claimed invention or express surprise at the making of
22 the claimed invention?

23 (7) Did others accept licenses under the
24 ePlus patents because of the merits of the claimed
25 invention?

1 Now, Lawson also contends that the claims in
2 the ePlus patents were obvious because the invention
3 defined in those claims were described in a printed
4 publication that was published before the inventors
5 made the claimed invention on August 10, 1994, or more
6 than one year before the inventors filed their U.S.
7 Patent application on August 10, 1994.

8 A patent claim is invalid if the invention
9 defined by that claim was described in a printed
10 publication before it was invented by the patentee or
11 more than one year prior to the filing date of the
12 patent-in-suit.

13 A printed publication must be reasonably
14 accessible to those members of the public who would be
15 interested in its contents or who would most likely
16 use it to qualify for a printed publication within the
17 meaning of this instruction.

18 An alleged prior art reference is reasonably
19 accessible upon a satisfactory showing that the
20 document was disseminated or otherwise made available
21 to the extent that persons ordinarily skilled in the
22 art exercising reasonable diligence can locate it. It
23 is not necessary that the printed publication be
24 available to every member of the public, thus
25 publications may include not only such things as

1 books, periodicals, and newspapers, but also
2 publications that are not widely available to the
3 public such as trade catalogs, journal articles, and
4 scholarly papers that are distributed or available to
5 those who are skilled in the art.

6 The information must, however, have been
7 maintained in some form, such as printed pages,
8 typewritten pages, magnetic tape, microfilm,
9 photographs or photocopies.

10 For a printed publication to render a claim
11 obvious, it must. When read by a person of ordinary
12 skill in the art, expressly or inherently disclose
13 what? The combination?

14 You know, this is why I asked you to do these
15 things, and you didn't do them. It's not right as
16 it's printed. If you can't tell me now how to correct
17 it, I'm striking the whole instruction.

18 MR. McDONALD: I think that first sentence of
19 that as last paragraph can just be deleted. Then you
20 can just pick it up from there. I think that's all
21 you have to do is take out that one sentence.

22 MR. ROBERTSON: I disagree.

23 THE COURT: Surprise, surprise.

24 MR. McDONALD: I think we would agree the
25 whole last paragraph is unnecessary.

1 THE COURT: All right. It's out. Okay.

2 All right, ladies and gentlemen, that brings
3 us to what you do when you leave here, and it's going
4 to be up to you as to how you handle it.

5 When you retire to your jury room to begin
6 your deliberations, you elect one of your members to
7 act as the foreperson. And that foreperson will
8 preside over your deliberations and be your
9 spokesperson here in court.

10 Your verdict has to represent the collective
11 judgment of the jury. In order to return a verdict,
12 it is necessary that each juror agree to it. In other
13 words, your verdict must be unanimous.

14 It is your duty as jurors to consult with one
15 another and to deliberate with one another with a view
16 toward reaching an agreement if you can do so without
17 violence to individual judgment. Each of you must
18 decide the case for himself or herself, but do that
19 only after you impartially consider it with the
20 evidence in the case along with your fellow jurors.

21 In the course of your deliberations, don't
22 hesitate to change your opinion if you think you're
23 wrong and if you think somebody else is right. But
24 don't surrender your honest convictions merely for the
25 sake of returning a verdict or because of the opinions

1 of other jurors are different than your own.

2 And remember at all times you're not
3 partisans; you are the judges. You are the judges of
4 the facts in this case. And your sole interest is to
5 seek the truth from the evidence that is received
6 during the trial.

7 Keep in mind your verdict must be based
8 solely on the evidence and the law, that nothing
9 you've seen or heard outside can be considered.
10 Nothing I've said and done during the trial is
11 intended to suggest to you in any way what I think
12 your verdict to be. That's up to you.

13 Nothing in these instructions is intended to
14 suggest what your verdict ought to be. Nothing in the
15 verdict form is intended to do that. They are all
16 offered to help you along the way.

17 Now, the verdict form is fairly
18 straightforward. You'll remember that they started,
19 when Dr. Weaver testified, ePlus presented its claims
20 of infringement in accord with certain configurations.
21 So you have got configurations 1 through 5 that you
22 have to decide here.

23 Looks like that you have a lot more to do
24 than perhaps you do, but in order to make sure that
25 you focus on what you are to focus on and we

1 understand what you have decided, we've determined
2 that this is the best way for you to record what you
3 do.

4 So when you have reached your unanimous
5 verdict on whether configuration 1, which is defined
6 here, infringes Claim 1 of the '516 patent, you check
7 yes or no, whichever your unanimous verdict is.

8 Then you go to '516, Claim 6, yes or no.

9 Then you go down to configuration 2, and it's
10 yes or no, whichever your unanimous result is for the
11 patent that's alleged to infringe. And that
12 configuration is alleged to infringe two claims of the
13 '683 patent.

14 And then there are six claims of the '516
15 patent, and one claim of the '172 patent.

16 And then there's configuration 3,
17 configuration 4, configuration 5, and then you've got
18 infringement.

19 And then you turn to invalidity.

20 Remember that the burden of proof on this
21 part, that is infringement, is different than it is
22 for this next part, Roman numeral 2, validity.

23 Then: Do you find that Lawson has proved by
24 clear and convincing evidence that any of the
25 following claims are anticipated by the Fisher RIMS

1 system? And you check off yes or no depending on what
2 you unanimously agree upon.

3 Do you find by clear and convincing evidence
4 that any of the following claims are anticipated by
5 the '989 patent? Same thing. And I'm not going
6 through it all.

7 And then you get to obviousness. And
8 obviousness is a little different. Do you find that
9 Lawson has proved by clear and convincing evidence
10 that any of the claims are obvious in light of the
11 combination of (1) either the RIMS system, the RIMS
12 brochure and/or the '989, and (2) either the TV/2
13 system or the TV/2 brochure and/or the TV/2 general
14 information, Claim 3, yes or no.

15 If you answered yes, then you put in here,
16 the next line down, what combination was it you found?

17 Mr. McDonald, when he was making his argument
18 slipped. He said that you should just fill in here
19 RIMS and TV/2 if that's what you found. Well, that's
20 not right. You have to fill in which ones of these
21 combinations listed in here if you find any
22 combinations. If you answered yes, you check yes, and
23 then you write down for us which one, combination or
24 combinations, you found. And you have to be unanimous
25 as to the combination. So you could not, for example,

1 come back with a verdict that said half of you believe
2 it was the '989 patent and the TV/2 general
3 information manual, and the other half of you find it
4 was something else. You have to be in agreement and
5 unanimous agreement on any alleged obviousness
6 reference.

7 Then you do that for each of the claims that
8 are listed in subparagraph (c)(1) through whatever it
9 is, 12.

10 And then the verdict form, when you've got
11 it, it's signed by the foreperson and dated, and you
12 bring it back here. You tell us when you have got a
13 unanimous verdict.

14 Now, how you proceed from this point on --
15 one other thing. If during your you deliberations it
16 somehow is necessary for you to communicate with the
17 Court, do you that by sending a note signed by the
18 foreperson, or all of you, or some of you if the
19 foreperson doesn't want to sign it, and I will then
20 communicate with the lawyers and respond to you either
21 in writing or ask you to come back in here and give
22 you a response.

23 Please bear in mind that when you give us a
24 note, if you do, we don't ever need to know how you're
25 divided on the issue if you are divided. We don't

1 want to know we're divided 4 to 4 or 3 to 5 or
2 whatever it is. All we need to know on the numbering
3 is when you have got a unanimous verdict.

4 Now, what you do from this point on is on
5 your schedule. You let us know. You can deliberate
6 and you can stay for a while in the evening if you
7 want do that. If you want to come back tomorrow, what
8 is it now? 4:00 o'clock. If you want dinner, you
9 need to let us know about an hour ahead of time so we
10 can get you a meal.

11 About the best we can do is pizza, but if
12 somebody has some special dietary requirement, we'll
13 try to find something for you and won't make you eat
14 pizza.

15 You-all just tell us what you want to do and
16 you're on your own schedule. And I'm not suggesting
17 in what I've said how long you should deliberate.
18 That's all up to you.

19 Any requests for additional instructions or
20 any objections to the instructions that were given?

21 MR. ROBERTSON: No, Your Honor.

22 THE COURT: Other than what was in the charge
23 conference, which were preserved.

24 MR. McDONALD: No, Your Honor.

25 THE COURT: All right. Thank you.

1 Ladies and gentlemen, we'll send you the
2 verdict form. We'll send you a copy of the
3 instructions. I'm going to have to have a couple
4 modifications made that I made on them, but it won't
5 take long. You'll get all of the evidence.

6 You're going to have a computer; is that
7 right?

8 MR. ROBERTSON: Yes, Your Honor.

9 THE COURT: And what is it that they are
10 going to do with the computer?

11 MR. ROBERTSON: They can play the
12 demonstrations that Dr. Weaver offered.

13 THE COURT: How do they do that? Is it a CD?

14 MR. ROBERTSON: The computer is all set and
15 ready to go. Just turn it on. Mr. Neal is going to
16 learn how to do it and he'll be able to tell the jury.

17 THE CLERK: God help us.

18 THE COURT: No, help them.

19 All right. We'll send the evidence back to
20 you. You-all can go ahead. Thank you very much. We
21 will await your decision.

22 (The jury begins deliberation at 4:10 p.m.)

23 THE COURT: Have you got a list of exhibits
24 that are going back?

25 MR. MERRITT: Your Honor, we have a list of

1 the plaintiff's admitted exhibits. I believe Mr. Carr
2 has a list of the defendant's. Everybody has compared
3 notes on them. I believe we are in agreement on what
4 should go back.

5 THE COURT: All right. How are you going to
6 mark what should go back?

7 MR. CARR: We each put into binders the ones
8 that are going back.

9 THE COURT: How are we going to put it in the
10 record?

11 MR. CARR: We can read it into the record
12 with Ms. Daffron.

13 THE COURT: What I don't want is -- it's not
14 as much a problem with civil cases, but I don't want a
15 Lentz problem. Do you know what that is?

16 MR. CARR: Yes, sir. Mr. Neal has pointed
17 that out.

18 THE COURT: All right. You dictate it into
19 the record then.

20 MR. MERRITT: Yes, sir.

21 THE COURT: All right. Now, on the
22 instructions, I'm going change 30A by taking out
23 paragraph 3.

24 On 37, I'm changing the last paragraph by
25 deleting the word "either," the next to the last word

1 in the third line from the bottom, and instead of
2 putting in "Johnson," I'm going to put "the '989."
3 That's a hangover from when there were more than one
4 patent references there.

5 Then on No. 36, in the second line I've
6 changed the word "anticipated" to "obvious." In the
7 third paragraph, third line from the bottom of that
8 paragraph I took out -- no, I didn't take it out. I
9 thought I did, but I didn't. Sorry.

10 And then I took out -- excuse me. On the
11 third page of that instruction, the entire last
12 paragraph on your agreement.

13 With those changes, those will be the
14 instructions that will go back to the jury. Is there
15 anything else we need to do?

16 MR. ROBERTSON: Not from my perspective, Your
17 Honor.

18 MR. McDONALD: No, Your Honor.

19 THE COURT: Counsel will remain available to
20 deal with any questions that there are.

21 THE CLERK: Judge, I hate to bother you, but
22 we have two questions about the exhibits. Maybe we
23 have to wait until the jury comes back.

24 THE COURT: Wait just a minute. Take this to
25 Ms. Hooper and have her change the jury set. Leave

1 mine like they are. Have her change the jury set and
2 bring that back here, if you would.

3 What's the question?

4 THE CLERK: The set of exhibits that's going
5 back to the jury, you may have to make a decision
6 depending on what happens. So we can retain them.
7 They may want to clean up something. They put all the
8 exhibits in the record. Normally we would return
9 exhibits to counsel.

10 Do you want to keep them in this instance or
11 do you want to just keep the exhibits that went back
12 to the jury?

13 THE COURT: I am going to let all of the
14 exhibits go back to counsel. Once we've got in the
15 record (A) what is admitted, and (B) what has gone
16 back to the jury, we know that, and it's up to counsel
17 to faithfully preserved those. And the plaintiff will
18 keep the plaintiff's and the defendants will keep the
19 defendant's. Or you-all can charge one or the other
20 with the responsibility and pay them rent or moving
21 fees or whatever you need to pay.

22 Tomorrow I want somebody to come to my office
23 and haul away all of the paper and trees that you've
24 killed so I don't have to put up with it anymore.

25 THE CLERK: I will await the jury

1 instructions, and I will get the exhibits back to the
2 counsel.

3 THE COURT: All right. We'll be in recess.
4 There's nothing else we need to do now because we
5 don't have any willfulness trial; is that right?

6 MR. ROBERTSON: That's right, Your Honor.

7 MR. McDONALD: Yes, sir.

8 THE COURT: Now that you've done this
9 exercise, do you think there's a reason why the chief
10 people of each side ought not go down and talk to --
11 who was it, Judge Dohnal or Judge Lauck?

12 MR. MERRITT: Judge Dohnal.

13 THE COURT: And talk to Judge Dohnal and see
14 if you can compromise? Or do you still want to beat
15 heads against each other and give Mr. McDonald a
16 Mercedes and give Mr. Robertson a BMW?

17 MR. ROBERTSON: I have a Ford 150 truck.

18 THE COURT: You want a Ford 150?

19 THE CLERK: He says he has one.

20 THE COURT: You-all ought to think about that
21 and decide. If I were you, I'd be trying to work out
22 a compromise that didn't result in a total wipeout.
23 It's particularly risky for Lawson.

24 All right.

25 (Recess taken.)

1 (The following is dictated into the record by
2 the attorneys:)

3 MR. MERRITT: The following are Plaintiff's
4 Exhibits that are being sent back to the jury to use
5 during its deliberations.

6 PX 1 through 11, inclusive, PX 13, and from
7 now on instead of prefacing them with PX, I'll simply
8 read the number. Each of these is preceded by a PX:
9 25, 32, 38, 43, 97, 98, 101, 103, 104, 105, 108, 109,
10 110, 112, 113, 117, 118, 127, 129, 131, 136, 149, 150
11 --

12 MR. CARR: 150 was supposed to have been
13 redacted. Has that been done?

14 MR. MERRITT: Let's put a mark next to that
15 question and I'll doublecheck that after I finish with
16 the list. PX 150 we're going to go back and check for
17 redaction.

18 153 is next, 154, 155, 156, 157, 170, 173,
19 188, 190, 191, 202, 208, 211, 212, 215, 216, 219, 225,
20 226, 228, 229, 230, 231, 234, 237, 238, 239, 276, 280,
21 317, 319, 320, 325, 337, 361, 363, 364, 367, 368, 374,
22 376, 379, 380, 417, 448, 464, 470, 482, and now we
23 have a series of exhibits that have some sub numbers
24 beginning with PX 501B1, that's B as in boy, PX 501D1,
25 D as in dog, PX 501I, PX 501L as in lion, PX 501M,

1 PX 501N, PX 501R.

2 And finally '516, 521, 522. That concludes
3 the PX list. And if we could go off the record for a
4 minute before I forget and let me check on the status
5 of PX 150.

6 MR. CARR: Let me read mine, then we'll look
7 at it together. The defense exhibits going back to
8 the jury are DX 7, DX 45, DX 61, DX 62, DX 96, DX 105,
9 DX 107, DX 117, DX 125, DX 126, DX 133, DX 139, DX
10 140, DX 141, DX 207, DX 211, DX 212, DX 213, DX 230,
11 DX 400, and 402.

12 (Recess taken.)

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